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No. 03-819

Supreme Court, U.S.
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In The

Supreme Court of the United States

*INFO*USA, INC. AND AMERICAN BUSINESS INFORMATION MARKETING, INC.,

Petitioners,

v.

CLAUDE M. SCHOCH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent, Claude M. Schoch, is an individual and therefore no corporate disclosure statement is required.

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STATEMENT OF THE CASE

Respondent, Claude M. Schoch ("Schoch"), offers this statement of the case to better explain and clarify the proceedings below.

I. Introduction.

This arbitration arose because, in 1996, Schoch sold his business, Digital Directory Assistance ("DDA"), to *info*USA and *info*USA subsequently tried to prevent Schoch from receiving some of the benefits of the parties' bargain. Schoch developed DDA from the ground up and had made it a successful and lucrative enterprise; as a result, *info*USA purchased DDA from Schoch. DDA's primary function was to publish telephone directories in CD-ROM format, including one internally known as "NYNEX," a directory relating to the New York and New England area. Three contracts, drawn up by *info*USA, were executed, all combining to effectuate the sale and purchase of Schoch's company. These contracts were: the Asset Purchase Agreement, the Employment Agreement, and the Notice of Stock Option Grant. (App. at 22a-23a.) The latter two agreements created the issues for arbitration.

The Employment Agreement executed by *info*USA and Schoch as part of the purchase made Schoch an employee of *info*USA for a period of three years, commencing September 10, 1996. (App. at 23a.) In conjunction with the Employment Agreement, the parties also executed a Notice of Stock Option Grant (hereinafter, the "Grant") on September 20, 1996. (*Id.*) Pursuant to the Grant, Schoch was granted the option to purchase a total of 360,000

shares of *info*USA's stock (180,000 shares before a two-for-one stock split which occurred during the course of Schoch's relationship with *info*USA). (*Id.*) The Grant vested Schoch's right to exercise his options over a four-year period (*i.e.*, 25% of the total options granted were to vest each year) and included a vesting schedule. (*Id.*)

The Grant required Schoch to exercise his options within three months of the end of his "employment or consulting relationship." Significantly, the Grant did not define the above-quoted language as coincident with the Employment Agreement. The relevant portion of the Grant reads as follows:

> Termination Period: Option may be exercised for up to three months after termination of ***employment or consulting relationship*** except as set out in Sections 7 and 8 of the Stock Option Agreement (but in no event later than the expiration date).

(emphasis added) (App. at 23a.). This provision and, more specifically, the emphasized language, is at the heart of the parties' dispute.

In accordance with its terms, the Employment Agreement between Schoch and *info*USA expired on September 9, 1999. The parties did not renew the Employment Agreement. As admitted by *info*USA in its brief to the Court of Appeals (Br. at i, 12 and 31), at *info*USA's behest Schoch continued to produce and do work on the NYNEX product on behalf of *info*USA over the course of the next three months (*i.e.*, October, November and December 1999). Schoch was not compensated for this work, which was a continuation of the work he had been performing for *info*USA for the prior three years, although by completing

the work he hoped the remaining, as yet unvested, stock options would vest. The last day Schoch performed work for *info*USA was December 17, 1999. (*Id.* at 23a.)

At the time the Employment Agreement expired on September 9, 1999, according to the vesting schedule set out in the Grant, Schoch was vested in 270,000 of the 360,000 stock options he had been granted thereunder. On December 17, 1999, Schoch attempted to exercise his options. (*Id.* at 23a.) [*I*]*nfo*USA refused his tender, claiming that Schoch had failed to exercise his options within three months of the termination of his Employment Agreement. (*Id.*) [*I*]*nfo*USA claimed that because Schoch's Employment Agreement expired on September 9, 1999, the period for exercising his options expired December 9, 1999, and Schoch was untimely. (*Id.*)

Schoch thought *info*USA's conclusion was wrong and that *info*USA was refusing to keep a promise made to him when he sold his company to *info*USA. Schoch knew his exercise was timely because the Grant provided that the options could be exercised for up to three months after the termination of Schoch's employment or consulting relationship, not the expiration of the Employment Agreement. Thus, on March 28, 2000, Schoch filed his Complaint against *info*USA in United States District Court for the District of Nebraska. (App. at 3a.) By motion, *info*USA argued that the Grant specified arbitration and demanded that the case be moved to arbitration. Upon a stipulated order, (*id.*) the parties entered into an Agreement to Binding Arbitration (*Id.* at 31a-35a) and, after discovery, the matter proceeded to arbitration before James A. Buckley, a respected, retired state trial court judge, in Omaha, Nebraska, between March 6 and March 8, 2002.

On May 14, 2002, Judge Buckley awarded Schoch $1,632,000. (*Id.* at 28a.) On June 7, 2002, Judge Buckley clarified his Award at *info*USA's request. (*Id.* at 30a.) Thereafter, the parties moved to confirm and vacate the Award in the District Court. (*Id.* at 3a.) On December 19, 2002, the District Court granted Schoch's motion to confirm the Arbitration Award, denied *info*USA's motion to vacate the Award, and entered judgment in favor of Schoch. (*Id.* at 11a-17a.) Thereafter, on January 17, 2003, *info*USA filed and served its Notice of Appeal to the Eighth Circuit.

II. The Arbitration Award.

Judge Buckley stated in his Award that there were two key issues to resolve in deciding the disputes between Schoch and *info*USA. (App. at 24a.) Only one, however, with two subparts, is significant in terms of *info*USA's continuing appeal. As to this one issue, Judge Buckley wrote:

> A. (1) As to the 270,000 options, does the Employment Agreement or the Notice of Stock Option Grant govern as to the status of [Schoch] on December 17, 1999?
>
> (2) If the Notice of Stock Option Grant governs was [Schoch] in an employment or consulting relationship as of December 17, 1999?

(*Id.* at 24a-25a.) Judge Buckley then answered those critical questions, writing:

> In resolving the issues just identified, I reach the following conclusions:
>
> A. "Employment" and "employment or consulting relationship" are not synonymous. The

word "relationship" makes the difference; it makes the term "employment or consulting relationship" broader than the term "employment" and including "consulting" as well as "employment" strongly suggests a relationship existing after the expiration of the Employment Agreement inasmuch as [Schoch] was clearly an employee, not a consultant, pursuant to and during the time of the Employee Agreement. Even if the terms are ambiguous, which I find they are not, they were drafted by [*info*USA] and therefore, must be construed in favor of [Schoch]. If [*info*USA] wanted to limit the option time to the Employment Agreement, they simply could have so stated. Accordingly, the Notice of Stock Option Grant governs as to [Schoch's] status on December 17, 1999.

B. When [Schoch] attempted to exercise his options on December 17, 1999, he was an employee but not a in [sic] consulting relationship with [*info*USA]. A new and formalized contract was not necessary. During the three years [Schoch] was an employee under the Employment Agreement, the amount of work did gradually decrease but making the NYNEX monthly product was from the beginning a primary function. By September 10, 1999, the expiration date of his Employment Agreement, making the NYNEX monthly report was virtually the only thing he was doing. At that time [*info*USA] was in the process of training a replacement to do the NYNEX but for the next three months they asked [Schoch] to continue doing NYNEX, which he did, albeit not without some prodding.

[*info*USA] also contends that whatever [Schoch] did, he was a volunteer. [Schoch] indeed was not paid for any work after September 10, 1999, nor

> did he expect any payment. He continued to do the NYNEX as requested in the hope that his numerous requests to be granted consultant status so as to validate the 90,000 options would be granted. I conclude that [Schoch] was a volunteer only in the sense that he voluntarily worked without pay and not that he voluntarily did work that was not requested. Therefore, [Schoch], doing virtually the same work after September 10, 1999, as before, was in an employee relationship when he served notice to exercise his options which had vested and had not expired.

(*Id.*) Essentially, Judge Buckley concluded that even though the Employment Agreement had ended, it was the Notice of Stock Option Grant that controlled Schoch's right to exercise his options and that the latter document by its express terms required only that Schoch be in an "employment or consulting relationship" within three months from the date of the exercise, which Schoch was. (*Id.* at 26a.)

After concluding that the Grant was controlling with respect to the nature of the relationship required of Schoch to exercise the rights granted him therein, and that Schoch was in an employment relationship with *info*USA through December 17, 1999, Judge Buckley then analyzed whether Schoch was entitled to any damages. The Arbitrator rejected Schoch's claim that he was entitled to additional compensation for work he performed after September 9, 1999. (App. at 27a.) As to the second component of damages claimed by Schoch – losses resulting from *info*USA's refusal to allow Schoch to exercise his options thereby preventing Schoch from selling the shares – Judge Buckley found that Schoch had proved resulting damages, in the Award writing:

Determining whether [Schoch] is entitled to any damages as to the 270,000 options and, if so, the amount is not amenable to any precise calculation or mathematical formula. Lost profits can be a measure of damages if they can be determined with reasonable certainty.

I conclude that Dr. Sherman's opinion [Schoch's expert economist] that [Schoch] would have sold all of his shares at a profit is simply too speculative to accept. On the other hand, it is difficult to find on any practical or evidentiary basis that [Schoch] would not have sold any of the 270,000 shares during the applicable time periods.

I believe that "reasonable certainty" in a case such as this has a broader meaning and correspondingly a lesser burden to establish as compared to most other situations. Determining where one would or would not sell 270,000 shares of any stock can be difficult but should not be impossible if there is a reasonable basis.

I find Arthur Cobb [*info*USA's expert] to be an expert in his field and a very credible witness. But I cannot accept his opinion, even though it is based on his analysis of [Schoch's] selling methodology, that [Schoch] would not have sold any of his shares even to the time of the hearing. But after thorough consideration of Mr. Cobb's testimony, particularly of his alternative scenarios, I conclude that his alternative analysis in which he calculates [Schoch's] damages at $1,632,000 makes sense in the practical realm and meets the requisite reasonable certainty. In doing so, I adopt as my material findings Mr. Cobb's testimony as stated on line 10, page 16 through line 5, page 729 of the transcript of the hearing.

(App. at 27a-28a.) At *info*USA's subsequent prompting for clarification on the damages issue, Judge Buckley supplemented his findings in a June 7, 2002, letter to the parties in which he stated, in relevant part, that he was amending his Award to add: "after the word 'hearing' on the third line at page nine the following: 'specifically', his analysis and calculations regarding the sale of the stock and the total profit of $1,632,000. I adopt this as findings of fact notwithstanding that Mr. Cobb characterizes it as hypothetical." (*Id.* at 30a.) Thus, Judge Buckley incorporated by reference a significant portion of the Petitioner's own expert testimony into his findings.

III. The District Court's Decision.

After the Award was issued, Schoch moved Judge Joseph F. Bataillon of the United States District Court to confirm the Award and *info*USA moved to vacate it. Judge Bataillon issued a written Memorandum and Order and an accompanying Judgment. (App. at 11a-17a.) In the Memorandum and Order, he considered the Award in light of the well-established standards governing review of arbitration awards. Specifically, Judge Bataillon concluded, quite properly, that his scope of review was very narrow, consistent with this Court's precedent and that of the Eighth Circuit. (*Id.* at 13a-14a.)

Judge Bataillon rejected *info*USA's argument that a heightened standard of judicial review more akin to *de novo* review was required due to inclusion in the parties' Agreement to Binding Arbitration of language directing that findings of fact and conclusions of law be stated. Judge Bataillon rejected this argument in light of the Eighth Circuit's explicit refusal to apply heightened

judicial review in the arbitration context. *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998). In its opinion, the District Court wrote:

> I have carefully reviewed the Award entered by Judge Buckley. Although there was not a substantial amount of case law cited, Judge Buckley clearly made legal and factual findings and determinations. For example, he determined that Schoch was an employee in December of 1999. Although he cited to no cases, he reviewed the contract to determine the language that related to Mr. Schoch's status as an employee or a volunteer, and the discussion therein included factors from relevant case law. That finding was crucial to the decision in this case. Even though this finding might have been in error, the arbitrator acted within the scope of his authority in construing the contract.
>
> Further, Judge Buckley made findings regarding the credibility of the expert witnesses and made damage determinations based on this testimony. I conclude that these determinations were based on the arbitrator's interpretation of the contract. I find that Judge Buckley did not violate any of the statutory grounds upon which I could vacate an arbitration award. The arbitrator's decision does in fact draw its essence from the contract. Consequently, pursuant to the case law cited herein and my limited review of the decision, I affirm the award issued by the arbitrator.

(App. at 16a-17a.)

IV. The Court of Appeals' Decision.

Unwilling to accept the District Court's determination, *info*USA appealed to the United States Court of Appeals for the Eighth Circuit. *Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003); (App. at 1a-10a.). Petitioner asserted that the Arbitrator exceeded his contractual authority, acted irrationally, and manifestly disregarded the law. (App. at 1a-2a.) In addition, *info*USA claimed that the parties had agreed to heightened judicial review. (*Id.* at 5a.) The Court of Appeals rejected each of Petitioner's arguments. (*Id.* at 10a.)

The court first analyzed Petitioner's claim that the parties contracted for heightened review. In effect, accepting without deciding that parties can contract for heightened judicial review, the court held that the parties had not clearly and unmistakably expressed their intent so to do in their written agreement for arbitration. (*Id.* at 7a-8a.) Thus, the Eighth Circuit effectively mooted *info*USA's claim before this Court by finding that the language used in the parties' agreement was insufficient, as a matter of law, to show their supposed intent for seeking higher judicial review. The Eighth Circuit then addressed *info*USA's other challenges to the Award under the applicable standards supplied by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2003) ("FAA") and relevant caselaw. (*Id.* at 8a-10a.) In each instance, the Court of Appeals found that the District Court had analyzed and properly decided the confirmation issue. (*Id.* at 8a-10a.) Having determined that all of *info*USA's arguments were wrong, the Court of Appeals affirmed the trial court's decision confirming the Award. (*Id.* at 10a.)

Yet again dissatisfied with the decision of a reviewing court applying the proper standards, *info*USA filed its Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Court does not need to address Petitioner's argument that the Federal Arbitration Act permits heightened judicial review pursuant to agreement of the parties. Even if parties may contract for judicial review outside the FAA, they did not do so in this case. Below, the Eighth Circuit ruled that the parties' agreement to arbitrate did not clearly and unmistakably express an intent to obtain heightened judicial review of the Arbitration Award. Almost four years before this arbitration, the Eighth Circuit decided *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998), in which the court announced that while it was not deciding the issue of heightened judicial scrutiny, parties seeking to contract for it must do so clearly and unmistakably. The language utilized in the present agreement to arbitrate does not reach this standard as it merely asks that the arbitrator provide a written opinion containing findings of fact and conclusions of law. Further, inclusion of language asking that the Award be in accord with applicable law does not meet *UHC Management's* standard.

At its heart, *info*USA's complaint is that the Arbitrator wrongly decided the merits of the dispute. The Arbitrator did not wrongly decide the dispute and each of the claimed errors was considered and decided by the lower courts. The Arbitrator discussed the two issues relevant to the Award and decided them against *info*USA. He included

findings of fact and legal conclusions in his award. The Arbitrator, even if legally or factually wrong, was interpreting the parties' agreement and his decision is entitled to deference under applicable standards.

Furthermore, on its face heightened judicial review of arbitration awards pursuant to contract is not permissible. The FAA sets forth Congress' prescribed standards of review and they are supplemented by only two congruent, generally recognized judicial expansions – manifest disregard for the law and complete irrationality. *See, e.g.*, *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 461 (8th Cir. 2001). Petitioner's suggestion that parties to arbitration may confer additional jurisdiction on federal courts must be rejected because, among other reasons, it would create federal court jurisdiction by contract, replace the FAA with myriad standards dependent on the whim of private parties, and result in more litigation (as in this instance), not less. None of this Court's decisions regarding arbitration expands private parties' rights so far, Petitioner's arguments to the contrary notwithstanding.

As stated above, the Eighth Circuit in this case did not definitively decide the issue of whether parties may contract for heightened judicial scrutiny and so this Court need not do so. Because the Eighth Circuit did not take a firm position one way or the other in deciding this matter, any split in the circuits' treatment of arbitration agreements should not be the basis for this Court taking up this appeal. Also, not all the lower federal courts have spoken on the issue and this Court should wait to decide the issue until a fuller treatment is available to it. Petitioner's claim that the number of arbitrations "could increase" as a result of resolving this issue is unsupported. Indeed, it is belied in some respect by this case as parties might

equally likely forego arbitration and immediately pursue litigation if they believe the dispute will ultimately have to be settled by the courts.

ARGUMENT

I. The Parties' Agreement To Arbitrate In This Case Does Not Express An Intent To Utilize A Heightened Standard Of Judicial Review.

In this case, the arbitration agreement does not express an intent to have the federal courts employ an alternate heightened standard of review, even in the event such alternate standard of judicial review is permissible under the FAA. The court of appeals held that the language relied upon by Petitioner for the claimed heightened judicial review did not "clearly and unmistakably" express the parties' intent to confer a higher, non-statutory standard of judicial review. (App. at 7a.) This statement is in accord with the Eighth Circuit's prior decision in *UHC Management*, *supra*, at 998. [*I*]*nfo*USA merely disagrees with the appeals court's legal conclusion.

In the agreement to arbitrate found in *UHC Management*, 148 F.3d at 997-98, the parties stated that in reaching his decision, the arbitrator would be "bound by controlling law." The court held that this phrase did not "clearly and unmistakably express[ ]" the parties' intent to contract for heightened review. *Id.* at 998. In support of its claim for heightened review in this case, *info*USA relies upon the following language from the Agreement to Binding Arbitration between itself and Schoch as clearly and unmistakably demonstrating the parties' intent:

II. Scope of Arbitrator's Powers.

. . .

> The Arbitrator shall issue an award consisting of findings of fact and conclusions of law within thirty days upon completion of the hearing, or as otherwise agreed to by the Parties. The Arbitrator's decision and award shall be valid and binding, judgment may be entered on such award, and such award shall be final as to the Parties, as long as the Arbitrator has not exceeded his or her authority (i.e., the award will be limited to disputes arising out of or related to the facts set forth in the Complaint and the Parties' Statements of Claims referred to in Paragraph No. 7, and resolved in accordance with applicable law).

(App. at 32a-33a.) [*I*]*nfo*USA focuses upon two provisions of that paragraph: (1) that the arbitrator shall issue an "award consisting of ***findings of fact and conclusions of law***" and (2) that the award shall be "valid and binding . . . as long as the arbitrator has not exceeded his or her authority (i.e., . . . ***resolved in accordance with applicable law.)***" (Id.) (emphases added). These provisions do not even approach the standard of "clearly and unmistakably" demonstrating the parties' intent to contract for heightened judicial review. *UHC Management*, *supra*. It might be noted here, too, that if heightened judicial review is permissible, the Eighth Circuit's *UHC Management* opinion appears to be wholly in keeping with *Gateway Techs., Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (requiring the contract to "expressly and unambiguously" provide for the claimed heightened judicial review), a case relied upon by Petitioner. Because heightened review is not permissible, as discussed in Part IV, *infra*, at best, the provision at issue in this case

demonstrates only that the parties wanted the arbitrator to issue an award that was more detailed than generally required under the FAA. *See Brennan v. King*, 139 F.3d 258, 267 n.11 (1st Cir. 1998) (noting that there is no requirement that arbitrators issue a memorandum discussing the evidence).

More importantly, the Eighth Circuit decided *UHC Management* early in 1998. [*I*]*nfo*USA and Schoch entered into their agreement for binding arbitration on June 8, 2001. Accordingly, accepting for purposes of argument that parties can contract for heightened judicial review of an arbitrator's decision, if in this case *info*USA wished the agreement to provide for such heightened review, Petitioner was on notice that it needed to employ language expressing the parties' intent clearly and unmistakably. *UHC Management*, at 998; (App. at 7a-8a). [*I*]*nfo*USA did not do so and just because it is disappointed with the outcome of the arbitration should not now be permitted to claim it did.

Like the provision at issue in *UHC Management*, (*i.e.*, to be "bound by controlling law"), the provision in this case that the parties' disputes be "resolved in accordance with applicable law" is not a clear and unmistakable expression that the parties intended to create a heightened standard of judicial review for the District Court. Accordingly, the arguments as to heightened judicial review asserted by *info*USA should be rejected. Both lower courts properly examined the Arbitration Award under the applicable standards of review set forth in the FAA. Petitioner's only problem is that in doing so, the lower courts ruled against it.

II. Contrary To *info*USA's Protestations About A Split In The Circuits, This Latest Appeal Is Based On Its Dissatisfaction With The Lower Courts' Decisions Enforcing The Arbitration Award And Is One More Attempt To Delay A Just Conclusion Of This Matter.

The actual, although obviously unarticulated, reason for *info*USA's latest appeal is its unwillingness to accept any conclusion where it is not the victor. [*I*]*info*USA is merely dissatisfied with the Arbitrator's conclusions on the merits. This is evident from the grounds raised in *info*USA's motion to vacate the award (App. at 11a-17a), and subsequent appeal to the Eighth Circuit. (App. at 1a-10a.) Yet mere disagreement with an arbitrator's conclusions is not grounds for overturning the award. *Bureau of Engraving, Inc. v. Graphic Communication Int'l Union, Local 1B*, 284 F.3d 821, 824 (8th Cir. 2002). Rather, as is well-established, an award is only subject to challenge on the grounds set forth in the FAA, and two extremely narrow, judicially recognized, congruous reasons – manifest disregard for the law and complete irrationality. Under none of these is reversal warranted.

Contrary to *info*USA's assertions, neither of the lower courts "blindly defer[red]" to, or "fail[ed] to seriously review" the Award. (Pet. at 25, 23.) Both courts actually considered all the grounds raised by *info*USA and rejected them under the applicable standards of review. For example, both courts noted that the Arbitrator provided findings of fact and conclusions of law. (App. at 8a-9a, 16a.) While each noted that the Arbitrator could have cited more caselaw, both recognized that the Arbitrator did discuss applicable legal principles. (*Id.*) The absence of citations is not fatal to the Award as arbitrators need not write perfect

opinions to be in compliance with the requirements of the agreements under which they act. *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991) ("The more basic point, however, is that since arbitrators' interpretations must be accepted even when erroneous, it cannot be correct that arbitrators are required to write good opinions."). Judge Buckley's Award identified and decided the legal issues and included relevant findings of fact.

Furthermore, "even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract" so "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority" the arbitrator's decision should not be overturned. *Bureau of Engraving*, 284 F.3d at 824. Judge Buckley certainly was "arguably construing or applying the contract" when he issued a written award containing his findings of fact and conclusions of law on the issues presented by the parties' agreement. His interpretation of what was required, there being no express provision in the contract adopting a specific standard for the detail required, is entitled to deference. *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 (8th Cir. 1986) ("We may not set an award aside simply because we might have interpreted the agreement differently or because the arbitrators erred in interpreting the law or in determining the facts."). Therefore, even if Judge Buckley erred in his interpretation and more detailed findings or specific case citations were intended by the parties' inclusion of the "findings of fact and conclusions of law" language, his determination is still entitled to be upheld. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 1923, 131 L. Ed. 2d 985, 993 (1995) (noting that a

court will set aside an arbitrator's decision "only in very unusual circumstances").

Judge Buckley is a respected, retired state trial court judge. His understanding of Nebraska law on damages and its demand for certainty as to the fact of damages but only reasonable certainty in calculating their amount is not open to question. Indeed, those very propositions of law appear in his Award, whether or not he cited a Nebraska case for them. (App. at 27a-28a.) In its Petition to this Court (Pet. at 28), *info*USA has not cited any Nebraska case enunciating different standards. Further, it is apparent from the Award and the District Court's opinion, that as to damages, part of the Arbitrator's conclusions rested on credibility determinations which do not lend themselves to appellate review.

As to *info*USA's complaint that Judge Buckley did not properly resolve the question of Schoch's employment, one of the employment cases Petitioner cites, a case of some importance in Nebraska, finds Judge Buckley as the trial judge and affirmed by our State's highest court. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997). Although not citing *Dernier* in the Award, it is inconceivable that Judge Buckley somehow forgot about *Dernier*, and indeed, utterly rejected it for his own brand of industrial justice, as suggested by *info*USA. Rather, Judge Buckley considered which of the parties' agreements controlled the question of Schoch's right to exercise his stock options and what action was required to so exercise. (App. at 24a-26a.) The Arbitrator essentially concluded that after expiration of the Employment Agreement, no new formal, written contract was necessary to create an employment relationship between the parties, because Schoch continued performing the same work he had been

doing for *info*USA at *info*USA's specific request. In so concluding, there is no evidence that Judge Buckley did not consider the applicable factors, discussing several in his Award, and concluding that Schoch was in an employment relationship with *info*USA so that Schoch's exercise of his stock options was timely. Petitioner merely disagrees with this determination. Even if reviewing courts disagree with an arbitrator or are convinced he committed serious error, that is not enough to overturn an award. *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 38, 108 S. Ct. 364, 370-71, 98 L. Ed. 2d 286, 299 (1987).

The Award in this case specifically sets forth the salient issues (*i.e.*, those that required resolution by the Arbitrator in order to establish a final resolution to the dispute), the factual findings relating to each issue, the legal conclusions reached by the Arbitrator, and thus resolves the dispute in accordance with applicable law. The Award in no way even suggests that Judge Buckley "dispensed his own brand of industrial justice." *Boise Cascade Corp. v. Paper Allied-Indust. Chem. & Energy Workers, Local 7-0159*, 309 F.3d 1075, 1085 (8th Cir. 2002). Indeed, the Award reflects the reasoned approach of a well-respected, retired state court judge, who worked with these types of legal issues and factual disputes over a distinguished private and public career. Accordingly, neither of the lower courts erred in confirming the Award.

III. The Issue *info*USA Proposes To Present To The Court Regarding Heightened Judicial Review Was Not Decided By The Court Of Appeals.

Divorced from the facade *info*USA erects in its papers to this Court, this appeal presents a rather mundane

challenge to an arbitrator's decision resolving a commercial dispute between an entrepreneur and the large company that bought the fruits of the former's labor. [*I*]*nfo*USA, however, seizes upon a split in the circuits regarding the power of parties to an arbitration agreement to control the manner in which federal courts review an arbitration award in order to entice this Court's attention and obtain review of an Award Petitioner finds objectionable. The Court need not consider Petitioner's challenge to the Arbitrator's Award as it has been twice before rejected and the Eighth Circuit below did not rule one way or the other with respect to the split among the circuits.

The Eighth Circuit's opinion did not resolve whether heightened judicial review pursuant to an arbitration agreement is permissible. Rather, essentially accepting that parties may contract for such review, the appeals court merely concluded that in this case the parties' contract did not unambiguously express such an intent. (App. at 7a-8a.) Thus, while recognizing the issue's existence, the Court of Appeals did not reach and decide it. Prudence dictates that if an issue is not ruled on or is unnecessary to the decision below a reviewing court need not address it on appeal. *See Yee v. City of Escondido*, 503 U.S. 519, 538, 112 S. Ct. 1522, 1534, 118 L. Ed. 2d 153 (1992); *see also Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) (recognizing courts of appeal should not consider issues not passed on in the district courts). Further, even if the appellate court's legal determination as to the parties' intent is erroneous, that is not a ground for the grant of *info*USA's Petition. *See* Sup. Ct. R. 10 (noting that the misapplication of a properly stated rule of law typically is not grounds for the grant of certiorari).

The split in the lower courts also is not a reason to grant certiorari in this case. First, while a split does appear to exist, it is not clear that the matter has been fully explored by the lower courts so as to give this Court the fullest possible explanation of the respective sides of the issue. In other words, further discussion of the issue by the remaining circuit courts of appeals may provide additional relevant considerations warranting review by this Court. This Court should not too rapidly close off the lower courts' own efforts to integrate and synthesize their decisions.

Second, it is not clear that the split has resulted in any chilling effect on the desire of parties to arbitrate their claims. While Petitioner suggests that resolution of this issue "could increase . . . the number of parties voluntarily participating in arbitration," (Pet. at 21), there is no evidence that the number of arbitrations has been or will be affected one way or the other. Indeed, it is more likely to presume that parties agreeing to arbitration do so because of the benefits historically received – expedition, simplicity and reduced costs. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 3354, 87 L. Ed. 2d 444, 456 (1985) (noting the simplicity, informality, expedition and reduced expense of arbitration). It is equally likely that parties, aware that formal judicial determination of their dispute would provide them other benefits, knowingly forego those because those other benefits are not important to them. As a result, injecting heightened judicial review back into the process may not coincide with the parties' expectations. *Id.* (noting that parties trade the rigors of the judicial system's processes and decisions for the relative simplicity and speed inherent in arbitration).

In fact, if parties believed that opting for arbitration would still embroil them in additional judicial review following arbitration, they would be less likely to undertake arbitration and would instead be encouraged to litigate their claims from the start, if possible. It would be a disincentive to arbitrate because that would become merely one more phase of litigation. As a result, it is generally unlikely that parties entering arbitration have conditioned their participation on increased involvement of the judiciary or the recent decisions of some lower federal courts concluding that such involvement is permissible under the FAA.

Finally, *info*USA has twice before raised to the federal courts what is its real challenge to the Arbitration Award – its substance. Each time the challenge has been rejected. In raising this issue again, *info*USA is merely demonstrating its continued disappointment with the Arbitrator's conclusions and with its own decision to arbitrate the issues between the parties. [*I*]*nfo*USA wanted to arbitrate the dispute and Schoch consented. Having demanded arbitration it must be presumed that *info*USA was fully aware that the procedures are not those of the federal courts. Now, having lost at each step of the way, Petitioner makes one last effort to obtain a victory. In doing so, *info*USA has turned this arbitration into just "one more step on the ladder of litigation." *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 n.7 (10th Cir. 2001). This is certainly not what Schoch bargained for when he accepted arbitration. Accordingly, the Petition should be denied.

IV. [*I*]*nfo*USA's Arguments Regarding Heightened Judicial Review May Be Summarily Rejected As Unworthy Of This Court's Consideration In Light Of The Decisions Of The Seventh, Ninth And Tenth Circuits.

As previously suggested, this Court need not reach the merits of the issue posited by *info*USA in its brief. If the Court would choose to do so, however, it should conclude that parties may not contract for heightened review. The Seventh, Ninth and Tenth Circuits have expressly held that such provisions are not enforceable. *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991); *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987 (9th Cir. 2003) (*en banc*); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001). These courts, which have refused to enforce provisions in arbitration agreements purporting to give federal courts additional, non-statutory powers in reviewing arbitration awards, have properly resolved the issue and the split in the circuits should be resolved accordingly.

In *Bowen, supra,* the Tenth Circuit held that a provision of an arbitration agreement giving each party the right to appeal the award to the district court "on grounds that the award is not supported by the evidence" did not entitle the district court to go beyond the standards set forth in the FAA for reviewing arbitration awards. *Id.* at 933-37. The appeals court rejected the notion that the parties' contractual right to determine what issues will be arbitrated and how the arbitration itself will be conducted also encompassed the right to "interfere with the judicial process" once the arbitration has concluded and the parties are seeking confirmation or vacatur of the arbitrator's award. *Id.* at 934 ("The decisions directing courts to

honor parties' agreements and to resolve close questions in favor of arbitration simply do not dictate that courts submit to varying standards of review imposed by private contract."). That is especially so where the standards for confirmation and vacatur are set forth by statute and judicial explanation. The *Bowen* court went on to recognize that if enforced, the contract provision at issue would undermine the FAA's policy to preserve the independence of the arbitration process; it would create a circumstance where the process the parties agreed to follow under the terms of their agreement would be respected and enforced, but the result of that process would not. *Id.* at 935.

The Ninth Circuit, *en banc*, recently agreed with *Bowen* in *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 1000 (9th Cir. 2003) (*Kyocera*), despite a previous ruling to the contrary. *LaPine Tech. Corp v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997) (*LaPine*) (overruled). In *Kyocera*, in addition to the grounds provided in the FAA, the parties agreed that the award could be vacated, modified or corrected if it was not supported by substantial evidence or if its conclusions of law were erroneous. *Id.* at 990-91. The full court rejected that private parties may by contract expand Congress' statutorily ordained standards governing arbitration awards. *Id.* at 1000 ("[P]rivate parties' freedom to fashion their own arbitration process has no bearing whatsoever on their inability to amend the statutorily prescribed standards governing federal court review. Even when Congress is silent on the matter, private parties lack the power to dictate *how* the federal courts conduct the business of resolving disputes.") (emphasis in original); *see also Chicago Typographical Union*, 935 F.2d at 1505 (holding that "parties cannot contract for judicial review of [an

arbitration] award; federal jurisdiction cannot be created by contract"). In the case of the FAA, Congress is not silent. The Seventh, Ninth and Tenth Circuits are correct.

Certainly, pursuant to the FAA, arbitration agreements are to be enforced like any other contracts. *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488, 500 (1989). [*I*]*nfo*USA emphasizes that truism and contends that this Court's prior rulings demand that a contract provision directing how the federal courts must review an award must likewise be enforced. It has never been the law that parties can confer jurisdiction on a federal court by contract. And none of this Court's cases cited by Petitioner has held that in such an agreement a provision purporting to confer additional jurisdiction on the federal courts is enforceable. In fact, and as suggested in *Bowen*, the cases relied upon by *info*USA suggest only that insofar as the parties seek to control how the arbitrator acts or how the arbitration itself will be conducted, their agreement on those terms will be enforced to ensure the arbitrator acts accordingly. *See First Options*, 514 U.S. at 943, 115 S. Ct. at 1923, 113 L. Ed. 2d at 992 (holding that provisions limiting the issues to be arbitrated are enforceable); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 115 S. Ct. 1212, 1216, 131 L. Ed. 2d 76, 84 (1989) (holding that arbitrator may decide punitive damages issue despite contrary state law); *Volt*, 489 U.S. at 479, 109 S. Ct. at 1256, 103 L. Ed. 2d at 500 (holding that parties to arbitration may utilize procedural rules found in state arbitration statute to govern the arbitration process itself). The Court's holding in each of these cases was eminently reasonable as each related to contractually agreed procedures in the

arbitration itself – a process which is non-judicial. These cases do not stand for the proposition that parties to a private agreement can specify the standard by which the federal courts must review an arbitrator's decision, especially where the standards are set forth in the FAA, or longstanding judicial determination.

[*I*]*nfo*USA asserts this Court "has implied that courts should enforce contractual provisions adjusting judicial review of arbitration awards" (Pet. at 12) relying on *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 104-15, 109 S. Ct. 948, 951-57, 103 L. Ed. 2d 80, 88-95 (1989). Petitioner's reliance on *Firestone* is misplaced. First, any such intimation is *dictum* and for that reason has no relevance to the resolution of this matter. *Kastigar v. United States*, 406 U.S. 441, 454-55, 92 S. Ct. 1653, 1662, 32 L. Ed. 2d 212, 223 (1972) (holding that discussion of matters not necessary to resolution of the issue before the Court should not be relied upon); *see also Permian Basin Rate Cases*, 390 U.S. 747, 775, 88 S. Ct. 1344, 1364, 20 L. Ed. 2d 312 (1968) (holding the "Court does not decide important questions of law by cursory dicta inserted in unrelated cases"). Second, the statutory provision being examined in *Firestone* did not contain any congressionally announced standards for reviewing the decision at issue (*i.e.*, a trustee's denial of benefits under an ERISA plan). The case before this Court is readily distinguishable as the FAA does delineate the standards for confirmation and vacatur of an arbitration award. Finally, this Court in *Firestone* adopted a standard (*de novo* review) as being most consistent with the legal principles governing trustees' actions and furthering ERISA's purposes to protect employees. As discussed below, adopting Petitioner's

contention in this case would render the standards provided by Congress in the FAA essentially meaningless.

Furthermore, if *Firestone* might be said to imply parties may contract for a different standard of review, the Court's decision in *First Options*, *supra*, strongly counsels to the contrary. *First Options* involved two issues under the FAA: 1) how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute, and 2) what standard should apply when a court of appeals reviews a district court's decision confirming or refusing to vacate an arbitration award. *Id.* at 940, 115 S. Ct. at 1922, 131 L. Ed. 2d at 991. In resolving the latter this Court wrote: "[w]e believe . . . that courts of appeals should apply ordinary, not special standards when reviewing district court decisions upholding arbitration awards. For one thing, it is undesirable to make the law more complicated by proliferating standards without good reasons." *First Options*, 514 U.S. at 948, 115 S. Ct. at 1926, 131 L. Ed. 2d at 996. As to the former, this Court held that if the parties agreed that the arbitrator had the authority to resolve whether a particular matter was subject to arbitration, the arbitrator's decision should be reviewed as any other decision of the arbitrator; "[t]hat is to say, the court should give considerable leeway to the arbitrator, setting aside his decision only in certain narrow circumstances." *Id.* at 943, 115 S. Ct. at 1923, 131 L. Ed. 2d at 992. If, as Petitioner contends, *Firestone* insinuates the Court's acceptance that parties may by contract vary the level of review to be conducted by the federal courts, *First Options* trumpets a contrary conclusion and one decided in the context of the FAA itself.

[*I*]*nfo*USA also suggests that its desired and supposedly contracted for "heightened judicial review" of arbitration awards is somehow different from its loathsome and unacceptable strawman, "expanded judicial review." (Pet. at 23.) According to *info*USA, the former should be entirely acceptable to a federal court because it "merely expresses the parties' intent to opt-out of the default FAA vacatur standards and asks the court to more seriously review the arbitrator's decision" while the latter is to be frowned upon as requiring the court to review matters beyond its expertise or matters which it would not otherwise consider in the absence of the parties' agreement. (*Id.*) On its face, this is a distinction without a difference and one not worthy of this Court's scrutiny.

[*I*]*nfo*USA's legal proposition is intellectually unsustainable since both types of "increased" scrutiny demonstrate the parties' "intent" to sidestep the FAA and compel the federal judiciary to apply the parties' contracted-for standard of review. Stated differently, if the parties' intent not to be governed by the FAA's standards of review is the sole consideration in opting out of the congressional scheme, then whether it is *info*USA's heightened review employing historic standards with which courts are familiar, or expanded review involving areas of little expertise or which are not typically the subject of judicial review, is wholly irrelevant – the parties, merely by virtue of their arbitration agreement, can order courts to perform as they wish. Taken to its ultimate conclusion, *info*USA's position would permit the parties to avoid all the standards identified in §§ 10 and 11 of the FAA which would result in a proliferation of standards of review, *First Options*, 514 U.S. at 948, 115 S. Ct. at 1926, 131 L. Ed. 2d at 996, dependent on the language of each agreement and

requiring a reviewing court to thereby discern the parties' intent. Such a result would almost certainly cause more litigation surrounding confirmation of awards, not less, which would essentially forfeit many of the benefits of arbitration, including its typical expediency, streamlined procedures, and cost effectiveness, and make arbitration "yet another step on the ladder of litigation." *Bowen*, 254 F.3d at 936 n.7. Furthermore, *info*USA's supposed narrow tailoring of the contracted-for heightened judicial review in this case (Pet. at 25) does nothing to eliminate the need for a reviewing court to analyze the parties' arbitration agreement to ascertain the standard adopted and how it should be applied.

CONCLUSION

For all of the aforementioned reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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